

# MANDATE

09-1564-cr  
USA v. Perez

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DATE FILED: 10/19/2010

UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT

SUMMARY ORDER

RULINGS BY SUMMARY ORDER DO NOT HAVE PRECEDENTIAL EFFECT. CITATION TO A SUMMARY ORDER FILED ON OR AFTER JANUARY 1, 2007, IS PERMITTED AND IS GOVERNED BY FEDERAL RULE OF APPELLATE PROCEDURE 32.1 AND THIS COURT'S LOCAL RULE 32.1.1. WHEN CITING A SUMMARY ORDER IN A DOCUMENT FILED WITH THIS COURT, A PARTY MUST CITE EITHER THE FEDERAL APPENDIX OR AN ELECTRONIC DATABASE (WITH THE NOTATION "SUMMARY ORDER"). A PARTY CITING A SUMMARY ORDER MUST SERVE A COPY OF IT ON ANY PARTY NOT REPRESENTED BY COUNSEL.

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Daniel Patrick Moynihan United States Courthouse, 500 Pearl Street, in the City of New York, on the 23<sup>rd</sup> day of September, two thousand and ten.

PRESENT: ROGER J. MINER,  
PIERRE N. LEVAL  
RICHARD C. WESLEY,  
*Circuit Judges.*

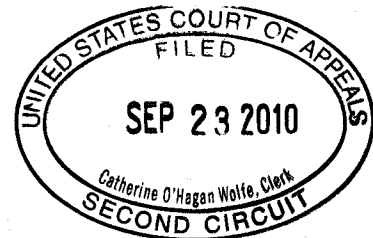
UNITED STATES OF AMERICA,

*Appellee,*

-v.-

FRANKIE PEREZ, also known as  
Perez2250X@aol.com, also known as  
Bxloveboy22@aol.com,

*Defendant-Appellant.*



09-1564-cr

MANDATE ISSUED ON 10/18/2010

1 FOR APPELLANT: EDWARD S. ZAS, Federal Defenders of New  
2 York, Inc., Appeals Bureau, New York, NY.  
3

4 FOR APPELLEE: HOWARD S. MASTER, KATHERINE POLK FAILLA,  
5 Assistant United States Attorneys, for  
6 Preet Bharara, United States Attorney for  
7 the Southern District of New York, New  
8 York, NY.  
9

10 Appeal from the United States District Court for the  
11 Southern District of New York (Cote, J.).  
12

13 **UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED**  
14 **AND DECREED** that the judgment of the district court be  
15 **AFFIRMED.**

16 Defendant-appellant Frankie Perez appeals from a  
17 judgment entered April 8, 2009 in the United States District  
18 Court for the Southern District of New York (Cote, J.),  
19 convicting him upon a plea of guilty to one charge of using  
20 a facility of interstate commerce to persuade, induce,  
21 entice, and coerce a child to engage in sexual activity, in  
22 violation of 18 U.S.C. § 2422(b). On April 6, 2009, the  
23 district court sentenced Perez principally to a term of 168  
24 months' imprisonment. We assume the parties' familiarity  
25 with the underlying facts, the procedural history, and the  
26 issues presented for review.

27 Perez first contends that his sentence should be  
28 vacated as procedurally unreasonable because the district

1 court failed to employ the correct legal standard. We are  
2 unpersuaded. Though the district court *did* recite the  
3 improper standard before imposing sentence – stating that  
4 its duty was to impose a “reasonable” sentence, instead of  
5 one “sufficient, but not greater than necessary” to fulfill  
6 the goals of 18 U.S.C. § 3553(a)(2) – that misstatement does  
7 not automatically render Perez’s sentence procedurally  
8 infirm. “[T]he court’s reference to imposing a ‘reasonable’  
9 sentence under the § 3553(a) factors, as opposed to say an  
10 ‘appropriate,’ ‘sensible,’ or ‘fair’ sentence under those  
11 factors . . . does not invariably plant the seeds of  
12 reversible error.” *United States v. Cruz*, 461 F.3d 752, 756  
13 (6th Cir. 2006); see also *United States v. Ministro-Tapia*,  
14 470 F.3d 137, 142 (2d Cir. 2006). It is well settled that  
15 we do not require “robotic incantations” on the part of  
16 district judges when imposing sentences, *United States v.*  
17 *Goffi*, 446 F.3d 319, 321 (2d Cir. 2006), and we will  
18 “entertain a strong presumption that the sentencing judge  
19 has considered all arguments properly presented to her,  
20 unless the record clearly suggests otherwise,” *United States*  
21 *v. Fernandez*, 443 F.3d 19, 29 (2d Cir. 2006). Here, there  
22 is no basis to conclude that the district court failed to

1 understand the command of the parsimony clause in sentencing  
2 Perez.

3 Perez next contends that the sentence imposed was  
4 procedurally unreasonable because the district court failed  
5 to explain the basis for its upward departure from the  
6 Guidelines range calculated by the Probation Office. See 18  
7 U.S.C. § 3553(c)(2); U.S.S.G. § 4A1.3(c). Because Perez  
8 failed to raise this argument to the district court, we  
9 review only for plain error, see, e.g., *United States v.*  
10 *Brennan*, 395 F.3d 59, 71 (2d Cir. 2005), and we discern no  
11 such error. While the district court failed to provide a  
12 written statement of reasons to support its departure – from  
13 a criminal history category of I to a criminal history  
14 category of III – the court's basis for departing was  
15 clearly stated in open court, and is plain from the record  
16 before us.

17 "The inadequacy of a defendant's criminal history  
18 category is not merely a permissible basis for an upward  
19 departure . . . [but] an 'encouraged' basis for such a  
20 departure." *United States v. Simmons*, 343 F.3d 72, 78 (2d  
21 Cir. 2003) (citing *Koon v. United States*, 518 U.S. 81, 94-95  
22 (1996)). The district court's decision to upwardly depart

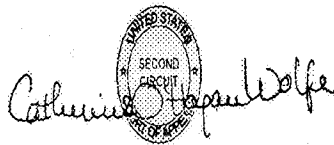
1 from the recommended Guidelines range was justified in light  
2 of additional criminal conduct – to which Perez admitted but  
3 which did not form the basis of his original Guidelines  
4 calculation – that the court reasonably concluded would bear  
5 on his risk for recidivism. Moreover, the record amply  
6 supports the court's imposition of a sentence of 168 months'  
7 imprisonment, the apogee of the post-departure Guidelines  
8 range. Because the district judge's oral statements are  
9 sufficient to justify the departure – and ultimate sentence  
10 imposed – the judgment will not be disturbed. "[S]ection  
11 3553(c)(2) does not require that a district court refer  
12 specifically to every factor in section 3553(a). A  
13 statement of the specific reason for the imposition of a  
14 sentence different from that recommended suffices." *United*  
15 *States v. Goffi*, 446 F.3d 319, 321 (2d Cir. 2006) (internal  
16 quotation marks omitted).

17 Finally, though the district court neglected to include  
18 a written statement of reasons to support its departure  
19 pursuant to Section 3553(c)(2), that defect is not fatal to  
20 the sentence. "[W]here a reviewing court determines that a  
21 departure is neither 'too high' nor 'too low' within the  
22 meaning of 18 U.S.C. § 3742(f)(2), a district court's

1 failure to include in the written judgment an explanation  
2 for its departure does not provide an independent basis for  
3 remand." *United States v. Fuller*, 426 F.3d 556, 567 (2d  
4 Cir. 2005). In the past, our Court has suggested it to be  
5 the "better course" to remand such matters to the district  
6 court for a supplementation of the written record. See,  
7 e.g., *Goffi*, 446 F.3d at 322 n.2; *United States v. Jones*,  
8 460 F.3d 191, 197 (2d Cir. 2006). However, on the  
9 particular facts and circumstances of this case, we conclude  
10 that remand is not warranted.

11 We reject Perez's remaining contentions as meritless.  
12 For the foregoing reasons, the judgment of the district  
13 court is hereby **AFFIRMED**.

14 FOR THE COURT:  
15 Catherine O'Hagan Wolfe, Clerk  
16  
17  
18  
19

The signature is written in cursive over a circular seal. The seal contains the text "UNITED STATES", "SECOND CIRCUIT", and "COURT OF APPEALS".

A True Copy

Catherine O'Hagan Wolfe, Clerk

United States Court of Appeals, Second Circuit

The signature is written in cursive over a circular seal. The seal contains the text "UNITED STATES", "SECOND CIRCUIT", and "COURT OF APPEALS".